

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff

CRIMINAL 08-0163 (ADC)

V.

[5] EDWIN COLÓN-DÍAZ,

Defendant

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
RE: RULE 11(c)(1)(B) PROCEEDINGS (PLEA OF GUILTY)

I. Personal Background

On April 29, 2008, Edwin Colón-Díaz, the defendant herein, was charged in a six-count indictment. He agrees to plead guilty to count one of the indictment.

Count one charges that defendant and other persons, did knowingly and intentionally, combine, conspire, and agree with each other and with diverse other persons known and unknown to the Grand Jury, to commit an offense against the United States, that is, to knowingly and intentionally possess with intent to distribute and/or to distribute controlled substances, to wit: in excess of 50 grams of cocaine base, a Schedule II Narcotic Drug Controlled Substance; and/or in excess of five kilograms of cocaine, a Schedule II, Narcotic Drug Controlled Substance; and/or in excess of 100 kilograms of marijuana, a Schedule I, Controlled Substance; within 1,000 feet of the real property comprising a public or private school, as prohibited by 21 U.S.C. §§ 841(a)(1) and 860. All in violation 21 U.S.C. § 846.

II. Consent to Proceed Before a Magistrate Judge

On April 15, 2009, while assisted by Gabriel Hernández-Rivera, Esq., the defendant, by consent, appeared before me in order to change his previous not guilty plea to a plea of guilty as to count one of the indictment.

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3 In open court the defendant was questioned as to the purpose of the hearing
 4 being held. The defendant responded that the purpose of the hearing was to plead
 5 guilty. The defendant was advised of his right to have all proceedings, including the
 6 change of plea hearing, before a United States district judge. Defendant was given
 7 notice of: (a) the nature and purpose of the hearing; (b) the fact that all inquiries
 8 were to be conducted under oath and that it was expected that his answers would
 9 be truthful (he was also explained that the consequences of lying under oath could
 10 lead to a perjury charge); and (c) his right to have the change of plea proceedings
 11 presided over by a district judge instead of a magistrate judge. The defendant was
 12 also explained the differences between the appointment and functions of the two.
 13 The defendant consent to proceed before this magistrate judge.

14 III. Proceedings Under Rule 11, Federal Rules of Criminal Procedure

15 A. Compliance With Requirements Rule 11(c)(1)

16 Rule 11 of the Federal Rules of Criminal Procedure governs the
 17 acceptance of guilty pleas to federal criminal violations. Pursuant to
 18 Rule 11, in order for a plea of guilty to constitute a valid waiver of the
 19 defendant's right to trial, guilty pleas must be knowing and voluntary:
 20 "Rule 11 was intended to ensure that a defendant who pleads guilty
 21 does so with an 'understanding of the nature of the charge and
 22 consequences of his plea.'" United States v. Cotal-Crespo, 47 F.3d 1, 4
 23 (1st Cir. 1995) (quoting McCarthy v. United States, 394 U.S. 459, 467
 24 (1969)). [There are three core concerns in these proceedings]: 1)
 25 absence of coercion; 2) understanding of the charges; and 3) knowledge
 26 of the consequences of the guilty plea. United States v. Cotal-Crespo, 47
 27 F.3d at 4 (citing United States v. Allard, 926 F.2d 1237, 1244-45 (1st
 28 Cir. 1991)).

23 United States v. Hernández-Wilson, 186 F.3d 1, 5 (1st Cir. 1999).

24 In response to further questioning, defendant was explained and he
 25 understood that if convicted on count one, he may be sentenced to a term of
 26 imprisonment of not less than 10 years or more than life, a fine not to exceed
 27 \$4,000,000, and a term of supervised release of at least five years. In accordance
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2 with 21 U.S.C. § 860, the maximum penalties would be twice that of section 841, and
3 at least twice the term of supervised release authorized by section 841.
45 Prior to defendant's change of plea hearing, the defendant shall pay a special
6 monetary assessment of \$100, per offense of conviction.
78 The court may order the defendant to pay a fine sufficient to reimburse the
9 government for the costs of any imprisonment, probation or supervised release
10 ordered and also the court may impose restitution. The defendant agrees to produce
11 complete information regarding all restitution victims and defendant agrees to
12 execute a financial statement to the United States. The United States will make no
13 recommendations as to the imposition of fines or restitution.
1415 Defendant was advised that the ultimate sentence was a matter solely for the
16 court to decide in its discretion and that, even if the maximum imprisonment term
17 were to be imposed upon him, he later could not withdraw his guilty plea if he was
18 unhappy with the sentence of the court. The defendant understood this.
1920 Defendant was explained what the supervised release term means. It was
21 emphasized that cooperation with the United States Probation officer would assist
22 the court in reaching a fair sentence.
2324 Emphasis was made on the fact that at this stage, no prediction or promises
25 as to the sentence to be imposed could be made by anyone. Defendant responded to
26 questions in that no promises, threats, inducements or predictions as to what
27 sentence will be imposed have been made to him.
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B. Admonishment of Constitutional Rights

29 To assure defendant's understanding and awareness of his rights, defendant
30 was advised of his right:
3132 1. To remain silent at trial and be presumed innocent, since it is the
33 government who has the burden of proving his guilt beyond a reasonable doubt.
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2 2. To testify or not to testify at trial, and that no comment could be made by
3 the prosecution in relation to his decision not to testify.

4 3. To a speedy trial before a district judge and a jury, at which he would be
5 entitled to see and cross examine the government witnesses, present evidence on his
6 behalf, and challenge the government's evidence.

7 4. To have a unanimous verdict rendered by a jury of twelve persons which
8 would have to be convinced of defendant's guilt beyond a reasonable doubt by means
9 of competent evidence.

10 5. To use the subpoena power of the court to compel the attendance of
11 witnesses.

12 Upon listening to the defendant's responses, observing his demeanor and his
13 speaking with his attorney, that to the best of counsel's belief defendant had fully
14 understood his rights, it is determined that defendant is aware of his constitutional
15 rights.

16 C. Consequences of Pleading Guilty

17 Upon advising defendant of his constitutional rights, he was further advised
18 of the consequences of pleading guilty. Specifically, defendant was advised that by
19 pleading guilty and upon having his guilty plea accepted by the court, he will be
20 giving up the above rights and would be convicted solely on his statement that he
21 is guilty.

22 Furthermore, the defendant was admonished of the fact that when he were
23 under supervised release, and upon violating the conditions of such release, that
24 privilege could be revoked and he could be required to serve an additional term of
25 imprisonment. He was also explained that parole has been abolished.

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2 D. Plea Agreement

3 The parties have entered into a written plea agreement that, upon being
4 signed by the government, defense attorney and defendant, was filed and made part
5 of the record. Defendant was clearly warned and recognized having understood
6 that:

- 7 1. The plea agreement is not binding upon the sentencing court.
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- 8 2. The plea agreement is an "agreement" between the defendant, defense
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- 9 attorney and the attorney for the government which is presented as a
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- 10 recommendation to the court in regards to the applicable sentencing adjustments
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- 11 and guidelines, which are advisory.
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- 12 3. The agreement provides a sentencing recommendation and/or anticipated
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- 13 sentencing guideline computation, that can be either accepted or rejected by the
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- 14 sentencing court.
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- 15 4. In spite of the plea agreement and any sentencing recommendation
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- 16 contained therein, the sentencing court retains full discretion to reject such plea
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- 17 agreement and impose any sentence up to the possible maximum penalty prescribed
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- 18 by statute.
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- 19 5. The defendant understands that if the court accepts this agreement and
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- 20 sentences defendant according to its terms and conditions, defendant waives and
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- 21 surrenders his right to appeal the conviction and sentence in this case.

22 Defendant acknowledged having understood this explanation.

23 E. Government's Evidence (Basis in Fact)

24 The government presented a proffer of its evidence with which the defendant
25 basically concurred.26 Accordingly, it is determined that there is a basis in fact and evidence to
27 establish all elements of the offense charged.

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2 F. Voluntariness

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4 The defendant accepted that no leniency had been promised, no threats had
5 been made to induce him to plead guilty and that he did not feel pressured to plead
6 guilty. He came to the hearing for the purpose of pleading guilty and listened
7 attentively as the prosecutor outlined the facts which it would prove if the case had
8 proceeded to trial.

9 IV. Conclusion

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11 The defendant, by consent, has appeared before me pursuant to Rule 11,
12 Federal Rules of Criminal Procedure, and has entered a plea of guilty as to count one
13 of the indictment.14
15 After cautioning and examining the defendant under oath and in open court,
16 concerning each of the subject matters mentioned in Rule 11, as described in the
17 preceding sections, I find that the defendant Edwin Colón-Díaz, is competent to
18 enter this guilty plea, is aware of the nature of the offense charged and the
19 maximum statutory penalties that the same carries, understands that the charge is
20 supported by the government's evidence, has admitted to every element of the
21 offense charged, and has done so in an intelligent and voluntary manner with full
22 knowledge of the consequences of his guilty plea.23
24 Therefore, I recommend that the court accept the guilty plea of the defendant
25 and that the defendant be adjudged guilty as to count one of the indictment. At
26 sentencing, the United States shall request the dismissal of the remaining counts of
27 the indictment.28
29 This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B)
30 and Rule 72(d) of the Local Rules of Court. Any objections to the same must be
31 specific and must be filed with the Clerk of Court within five (5) days of its receipt.
32 Rule 510.1, Local Rules of Court; Fed. R. Civ. P. 72(b). Failure to timely file specific

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3 objections to the report and recommendation is a waiver of the right to review by
4 the district court. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

5 At San Juan, Puerto Rico, this 17th day of April, 2009.

6 S/ JUSTO ARENAS
7 Chief United States Magistrate Judge

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